Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90
	)	
	)	

REPLY COMMENTS OF INTUIT INC.

Intuit Inc. ("Intuit") is a leading provider of personal finance management, accounting, and tax preparation software and web-based services for individuals and small businesses. Intuit is committed to consumer privacy and applauds the Federal Communications Commission's (the "FCC's" or the "Commission's") efforts to provide consumers with tools to avoid unwelcome telemarketing solicitations. At the same time, however, as described in its original comments in this proceeding, Intuit is concerned that imposing overly burdensome restrictions may unnecessarily interfere with the legitimate telemarketing activities of responsible companies and result in less convenience for customers.

Following the deadline for submitting initial comments in this proceeding, the Federal Trade Commission (the "FTC") adopted final regulations amending its Telemarketing Sale Rule (the "TSR"). The amendments to the TSR, including the FTC's establishment of a national do-not-call registry, have significantly changed the legal landscape in the midst of this proceeding. Accordingly, Intuit submits these reply comments in order to urge the Commission to consider the inter-relationship among the FCC's and the FTC's rules, as well as state do-not-call laws, to address other comments that were submitted in connection with the initial stage of this rulemaking proceeding and to amplify several of its original comments.

Intuit urges the Commission to work with the FTC so that both consumers and industry will be provided with a single set of rules. Accordingly, if the FCC elects to create a national do-not-call registry, the Commission should properly carry out its legislative mandate to establish a *single*, national do-not-call registry that preempts state laws and places the responsibility for administering the registry under the authority of the FCC.

I. An FCC National Do-Not-Call List Should Operate in Conjunction with the FTC List as well as Preempt State Do-Not-Call Laws in Order to Maximize Consumer Convenience and Avoid Imposing Unnecessary Costs on Businesses

Any do-not-call list established by the FCC pursuant to the Telephone Consumer Protection Act of 1991 (the "TCPA") should be designed to provide consumers and businesses with "one-stop shopping." In particular, the FCC should exercise its authority to expressly preempt the application of state do-not-call laws. These measures are necessary in order to maximize consumer convenience and to avoid confusion through the operation of a single do-not-call registry. At the same time, they will avoid the imposition of unnecessary burdens on businesses.

In its Notice of Proposed Rulemaking (the "NPRM"), the Commission sought comment on whether, and to what extent, state do-not-call requirements should be preempted. In enacting the TCPA, Congress specifically considered the fact that "States do not have jurisdiction over interstate calls."[1] The legislative history of the TCPA demonstrates that Congress also was mindful of the problems that would arise through the creation of multiple do-not-call lists and

[1] SEN. REP. NO. 102-176 (1991) at 3.

took steps to avoid those problems.[2] The failure to implement a single national list through the express preemption of state laws would interfere with the balance that Congress sought to strike under the TCPA.

As described in Intuit's initial comments, the House Report accompanying the TCPA stated that "the House Committee [] believes that because state laws *will be* preempted, the Federal statute must be sufficiently comprehensive and detailed to ensure States' interests are advanced and protected."[3] Accordingly, the TCPA was intended to establish standards that apply to both interstate and intrastate telephone solicitations. In fact, Congress specifically carved out an exception to the Communications Act to allow the Commission to apply its TCPA authority to intrastate communications and authorized the Commission to "require the establishment and operation of a single national database" of do-not-call requests.[4]

While the language of the TCPA states that it does not preclude states from enacting more restrictive "intrastate" requirements, the ability of states to do so is expressly subject to a determination by the FCC to adopt a national do-not-call registry. Under the relevant provision of the TCPA, if the Commission decides to establish a national list, "a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing

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[2] *See, e.g.*, H.R. REP. NO. 102-317, at 10 (1991) ("[A] substantive argument can be made that federal legislation is needed to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards."); 137 CONG. REC. H11311 (daily ed. Nov. 26, 1991) (statement of Rep. Rinaldo) ("To ensure a uniform approach to this nationwide problem, this bill would preempt the States from adopting a database approach, if the FCC mandates a national database. From the industry's perspective, this preemption has the important benefit of ensuring that telemarketers are not subject to duplicative regulation.").

[3] H.R. REP. NO. 102-317, at 21 (emphasis added). *See also* 137 CONG. REC. S18781 (daily Ed. Nov. 27, 1991) (statement of Sen. Hollings) ("Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted."); 137 CONG. REC. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey) ("The legislation, which covers both intrastate and interstate unsolicited calls, will establish Federal guidelines that will fill the regulatory gap due to differences in Federal and State telemarketing regulations. This will give advertisers a single set of ground rules and prevent them from falling through the cracks between Federal and State statutes.").

[4] 47 U.S.C. §152(b).

system that does not include the part of such single national database that relates to such state."[5] Thus, Congress intended that in the event that the Commission authorizes a national do-not-call list, a state must enforce its do-not-call obligations by requiring use of the segment of the national list that pertains to its citizens instead of a separately maintained list.[6] Intuit agrees, therefore, with the position of the Direct Marketing Association that, contrary to the position of some commenters,[7] more restrictive state do-not-call laws would be preempted with the establishment of a national do-not-call list.[8]

By exercising its authority to create a single, national do-not-call database, the Commission would make it far easier for consumers who would understand that the FCC's national do-not-call registry is the only list with which they need to register their names and numbers. Simplicity and convenience for consumers, for whose benefit the national-do-not-call list is intended, should be paramount considerations in this rulemaking. Allowing states to continue to operate intrastate do-not-call laws in the presence of a national registry that applies to both interstate and intrastate calls would only serve to frustrate consumers who incorrectly assume that registering at the state level will stop all calls.

At the same time, telemarketers engaging in solely intrastate telemarketing campaigns would be permitted to use only the portion of the national do-not-call list that corresponds to the

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[5] 47 U.S.C. §227(e)(2).

[6] *Id*. at §227(c)(3)(J) (requiring database to be designed to enable states to use it to enforce state law).

[7] *See, e.g*., Comments of the National Association of State Utility Consumer Advocates at 14 ("NASUCA Comments") (stating that TCPA Section 227(e)(1)(D) prohibits preemption of any state law that "imposes more restrictive intrastate requirements or regulations on… the making of telephone solicitations."). *See also* Comments and Recommendations of the Tennessee Regulatory Authority and the Tennessee Attorney General at 4-10 ("Tennessee Regulatory Authority Comments") (noting that although it does not believe that the proposal for the national program intends to expressly preempt state law, the de facto effect of a national registry would be to preempt the Tennessee program).

[8] *See* Comments of the Direct Marketing Association at 44 ("Direct Marketing Association Comments") ("If the FCC adopts a national do-not-call list, a state may enforce this Commission's requirements as to all calls terminating in that state, but its jurisdiction to do so would arise under federal law, and federal substantive standards and any independent authority to establish "more restrictive" intrastate standards would expire by operation of section (e)(1) of the TCPA.").

state or market in which it is conducting its campaign. This would represent both a more convenient solution for consumers and a more cost-effective regulatory approach.

The Commission also should work closely with the FTC in establishing a single set of national do-not-call rules. In doing so, the Commission should urge the FTC to consider that Congress specifically intended the Commission's rules to preempt state do-not-call laws and that the Commission therefore is in a far better position to establish a single, national do-not-call list. Duplicative or conflicting requirements only will interfere with the creation and effective administration of a single, national do-not-call registry. A consistent set of rules is critical because of the FTC's lack of jurisdiction with respect to certain industries such as common carriers and banks. There is simply no justification for exempting from the requirements of a national do-not-call registry large industry segments, such as financial institutions that are not themselves subject to the FTC's jurisdiction but compete with companies that are subject to its jurisdiction. Only by exercising its legislative authority to establish a single, national do-not-call registry will the Commission be able to avoid the competitive disadvantages that otherwise would result from the limitations on the FTC's jurisdiction.

II. The FCC Should Retain its Broad Established Business Relationship Exception

In amending the TSR, the FTC adopted an established business relationship exception that is significantly different from the current exception used by the FCC.[9] Intuit believes that the FTC approach is incompatible with the purposes and intent of the TCPA and that the Commission should leave the established business relationship exception in its current form. Moreover, in an effort to harmonize the agencies' rules and carry out its legislative mandate to create a single, national do-not-call registry, Intuit urges the Commission to work with the FTC

[9] *See* Telemarketing Sales Rule: Final Amended Rule and Statement of Basis and Purpose, *available at* http://www.ftc.gov/os/2002/12/tsrfrn.pdf (Dec. 18, 2002) (to be codified at 19 C.F.R. §310) ("FTC Statement").

to adopt a more flexible approach similar to the FCC's current approach to administering its established business relationship exception. The Commission also should clarify that registering with the national do-not-call list should not be considered a termination of an established business relationship, which was raised as a potential problem by several commenters.[10]

A. The FCC Should Not Artificially Limit the Duration of an Established Business Relationship

The FTC recently adopted an established business relationship exception that would result in a deemed termination of an established business relationship upon eighteen months after a prior purchase or upon three months after any other contact establishing a business relationship.[11] Several commenters support the Commission's limiting the exemption in a similar fashion, and assert that a business relationship should be considered to have expired after a specified time period following a purchase or inquiry.[12]

For many companies in the computer software and web services industries such a time limitation on the established business relationship rule would be inconsistent with the manner in which their customers form business relationships with them. Even a longer time period, such as the twenty-four months proposed by some commenters, is unnecessarily restrictive.[13] Intuit's personal finance and accounting products such as Quicken® can be used by consumers for several years. Just because a customer does not upgrade in a particular year does not mean that he or she would not be interested in hearing about a new version the following year or the year after that.

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[10] *See, e.g.*, Comments of Verizon Wireless at 6 ("Verizon Wireless Comments"); Comments of Cingular Wireless at 10 ("Cingular Wireless Comments"); Comments of Bell South ("Bell South Comments") at 5.
[11] *See* FTC Statement at 38-39 (explaining new 19 C.F.R. §310.2(n)).
[12] *See, e.g.*, Texas Office of Public Utilities Counsel Comments at 5 ("Texas PUC Comments"); NASUCA Comments at 17; Comments of SBC Communications, Inc. at 11 ("SBC Communications Comments").
[13] *See, e.g.*, Comments of the Magazine Publishers of America at 11 ("MPA Comments"); Electronic Retailing Association Comments at 11 ("ERA Comments"); Texas PUC Comments at 5; NASUCA Comments at 17.

As noted in the company's initial comments, many Intuit customers come to expect either a phone call, email, or direct mail piece to remind them to upgrade their software or to inform them of new products and services. Furthermore, as discussed more fully below, customers may be interested in hearing about new products and web-based services that were not offered when they acquired a particular product or service several years in the past.

The FTC also adopted a rule giving telemarketers only three months to contact consumers who have made inquiries that would establish a business relationship. This approach is not practical from the perspective of an online services provider and software company such as Intuit. Intuit offers consumers a wide range of choices in deciding whether and how they would like to receive information about new product or service offerings. Intuit customers may opt to hear about new offers in a variety of ways, including by means of telephone. A time-based restriction on contacting customers who have made inquiries may interfere with the ability of businesses to communicate with the very users that would welcome the solicitations. Moreover, it may not be permissible to impose arbitrary restrictions on certain forms of protected commercial speech, such as a telephone solicitations, when other forms of speech are not similarly burdened.

The imposition of time-based restrictions on communications with consumers who have made inquiries may serve to interfere with consumer expectations and reduce convenience. Intuit believes that there is no need for such a limitation. Such a rule would only significantly increase the burdens on industry and heighten consumer privacy concerns. Businesses would be provided with incentives to monitor and record customers' every inquiry and contact in order to keep their relationships alive. Such time restrictions also would make enforcement more expensive and difficult for the FCC. Because consumers are able to end an established business relationship at any time simply by asking to be taken off a particular company's list, educating consumers about this option instead of creating greater administrative hurdles would be more efficient as well as more consumer friendly. Consumers may want to hear from a company they established a business relationship with several years in the past about a product offering that did not exist at that time. They will not have been bothered by phone calls in the interim and one conversation will suffice to terminate a relationship that a consumer no longer wants to maintain.

B. The FCC Should Not Make an Established Business Relationship Contingent Upon a Prior Purchase or Transaction

Several commenters proposed that the existence of an established business relationship be contingent upon a customer's having made an actual purchase or transaction.[14] The Commission's rules should continue to recognize that any "voluntary two-way communication" may give rise to an established business relationship.[15] Intuit believes that imposing limitations on the nature of the relationship would ignore Congress' intention that the established business relationship rule allow companies to "build upon" existing customer relationships.[16] Moreover, such a restriction would be inconsistent with the approach taken by the FTC when it revised the TSR, and in doing so acknowledged that an established business relationship may be formed by an inquiry without the requirement of a purchase without the requirement of a purchase.

The legislative history of the TCPA demonstrates that Congress intended that the established business relationship exemption would permit businesses to follow up with consumers who have requested information about a product or service, regardless of whether

[14] *See, e.g.*, NCL Comments at 5 (asking that the exemption be limited to customers who have set up an account for the purpose of making repeated transactions); NASUCA Comments at 17 (asking for purchase requirement); Texas PUC Comments at 5.
[15] 47 C.F.R. §64.1200(f)(4)
[16] H.R. REP. NO. 102-317, at 13-15 (1991).

these inquiries led to a consummated transaction.[17] The current limits of the FCC's established business relationship are sufficient to ensure that the relationships that fall under the established business relationship exception are in fact established relationships. The requirement of prior voluntary communication between the consumer and the business means that only consumers who have affirmatively demonstrated interest in a company's products or services can continue to be called.

Many users of Intuit's services have registered with the company without making a purchase. For example, users of Intuit's *Quicken.com* web site provide personal information and create online portfolios in order to track their investments. These users trust the company with their personal information, consider themselves consumers of Intuit's services and are offered the opportunity to receive news about product or service offerings by various means, including telemarketing. Any approach imposing arbitrary time-based restrictions or requiring a purchase in order to communicate with such users via the telephone fails to take into account the variety of business relationships that exist, particularly in the area of web based services. The failure to properly recognize these relationships would interfere with user consumer expectations and would be inconsistent with the legislative intent behind the TCPA.

C. Businesses Should Be Able to Continue to Use Third Party Telemarketers to Call Customers With Whom They Have Established Business Relationships

Several commenters have asked the Commission to clarify that the use of third-party contractors falls within the scope of the established business relationship exception.[18] Intuit believes that the applicable rule already exempts such third parties by exempting any "call or

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[17] *See* Comments of Nextel Communications, Inc. at 12 ("Nextel Comments") (quoting H.R. REP. NO. 102-317, at 13 (1991): "consumers who previously have expressed interest in products or services offered by a telemarketer are unlikely to be surprised by calls from such companies or to consider them intrusive.").

[18] *See* Verizon Comments at 14; SBC Comments at 11; NASUCA Comments at 18; Comments of the National Consumer League at 5 ("NCL Comments").

message by, or on behalf of, a caller…[t]o any person with whom the caller has an established business relationship at the time the call is made."[19] Under the amended TSR, the FTC's established business relationship exception expressly permits a consumer who is registered on the FTC's do-not-call list to be contacted by a telemarketing contractor of a business with whom the consumer has an established business relationship.[20] This recent affirmation of the FCC's historical position demonstrates that it remains a good approach and should not be changed in this rulemaking.

D. The FCC Should Reaffirm that the Established Business Relationship Exception is Business Specific Rather than Product or Service Specific

In the *NPRM*, the Commission requested comment on whether the established business relationship should be restricted based on the product or service that forms the basis of the relationship.[21] The Commission should leave unchanged the established business relationship rule's scope and continue to exempt businesses, not the products or services, that are the basis of the relationship with the consumer. The TCPA mandates an unqualified exemption; any attempts to limit the applicability to calls concerning specific products or services would frustrate the statute's purpose.[22]

Many commenters seized upon the Commission's citation in its *NPRM* of legislative history indicating that Congress may have authorized product specific limitations on the

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[19] 47 C.F.R. §§ 64.1200(c); 64.1200(e)(2)(iii).
[20] *See* 19 C.F.R. §310.4(b)(1)(iii)(B)(ii).
[21] *See* NPRM, ¶20 (requesting comment on whether to modify the definition of "established business relationship" so that a company that has a relationship with a customer based on one type of product or service may not call consumers on the do-not-call list to advertise a different service or product).
[22] 47 U.S.C. §227(a)(3) (noting that for the purpose of the statute, the term "telephone solicitation" does not include a call or message "to any person with whom the caller has an established business relationship.")

established business relationship exception.[23] However, the legislative record also reflects Congress' intention to permit businesses to market a wide variety of products to their existing customers.[24] Particularly in the web services and software industries, products are constantly changing and improving, and they are increasingly designed to complement and interoperate with other products and services. Such a requirement would have the unintended consequence of punishing innovative companies and industries, as well as the consumers that demand such innovation.

Not only would artificial limitations on the products and services that may be offered be counter productive for consumers, it also would be very difficult as a practical matter to distinguish between the different products and services that supposedly formed the basis of a particular established business relationship. As several commenters have noted, the difficulty in distinguishing between products and services inevitably would lead to disputes that would drain the resources of both the Commission and the courts.[25]

III. The Commission Should Not Impose a Predictive Dialer Abandonment Rate, But Any Regulation it Does Adopt Should Have No Lower than a Five Percent Maximum Abandonment Rate.

Predictive dialing systems offer many benefits to consumers, including lower prices, fewer misdials, and improved quality controls. However, as mentioned in its initial comments, Intuit understands that consumers are frustrated and annoyed by abandoned calls, and the company is continuously working to lower dropped call rates. Instead of regulating abandonment rates, Intuit believes that the Commission should instead encourage industry's

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[23] *See, e.g.*, Comments of the Public Utilities Commission of Ohio at 15-16 ("Ohio PUC Comments").
[24] *See* Nextel Comments at 11-12 (citing House Report, H.R. Rep. No. 102-317, at 14-15: "[a] person who recently bought a piece of merchandise may receive a call from the retailer regarding special offers or information on related lines of merchandise, [and a] loan officer or financial consultant may call a telephone subscriber who had requested a loan or bought auto insurance a couple of months ago to pitch new loan offerings or other types of insurance.")
[25] *See, e.g.*, Comments of Xpedite Systems, Inc. at 9 ("Xpedite Comments") (describing problems that could be raised by a "relatedness" standard); DMA Comments at 19.

attempts to adopt voluntary standards and work to lower the dropped call rate through technological advances.

According to an American Teleservices Association ("ATA") study, ninety-four percent of all call centers can operate efficiently at a five percent abandonment rate. By contrast, only sixty percent are able to operate efficiently at a three percent maximum abandoned call setting. Lowering the maximum abandonment rate to one percent would mean that only seven percent could operate efficiently.[26] Should the Commission decide to adopt a maximum abandonment rate, the balance between consumers' interest in avoiding "dead air" calls and call center efficiency is best struck by adopting a maximum abandonment rate of five percent. Furthermore, any regulation mandating uniform acceptable dropped call rates should expressly preempt individual state laws mandating abandonment rates.

Respectfully submitted,

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[26] *See* California Workshop: Predictive Dialers and Abandoned Calls, *available at* http://www.ataconnect.org/htdocs/govtrel/news/2002/nov/capuc.htm (Nov. 6, 2002).